REPORT OF OPINION AND RECOMMENDATIONS

AFTER AN INQUIRY PURSUANT TO SECTION 30 OF
The Member's Conflict of Interest Act

PURSUANT TO A REQUEST SUBMITTED BY
BRENDA BAKKEN, MLA, WEYBURN-BIG MUDDY

RESPECTING

DWAIN LINGENFELTER and
THE HONOURABLE CLAY SERBY, MLA, YORKTON and
MINISTER OF SASKATCHEWAN AGRICULTURE AND FOOD

G.L. GERRAND, Q.C.
CONFLICT OF INTEREST COMMISSIONER
FOR THE PROVINCE OF SASKATCHEWAN

Saskatchewan
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March 15, 2002.

The Speaker of the Legislative Assembly,
Room 128, Legislative Building,
Regina, Saskatchewan.
S4S 0B3

Dear Mr. Speaker:

Re: Inquiry pursuant to Section 30 of
The Member's Conflict of Interest Act
respecting business activities of Eric Upshall
and Saskatchewan Agriculture and Food
File Reference: C 5274.017 GLG

Pursuant to subsection 30(4) of *The Member's Conflict of Interest Act*, I am delivering to you today a copy of my Report of Opinion and Recommendations with respect to the above-described matter.

Yours very truly,

G. L. GERRAND, Q.C.
Conflict of Interest Commissioner
Province of Saskatchewan

GLG/oc
Enclosure

DELIVERED BY HAND

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SPEAKER

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REQUEST FOR AN OPINION

By letter dated December 19, 2001, Brenda Bakken, MLA for Weyburn-Big Muddy, wrote to me outlining certain concerns that had come to her attention respecting the activities of Mr. Eric Upshall ("Upshall"). Attached to the letter was a copy of a Statement of Claim in a civil action brought by Upshall against Kevin Durst ("Durst") as well as a copy of an Affidavit completed by Upshall in support of an application for a Pre-Judgment Garnishee Summons. A copy of Ms. Bakken's letter to me of December 19 and the attachments are attached as Appendix "A" to this report.

The genesis for the concerns of Ms. Bakken are to be found in a newspaper story published in the Regina Leader Post December 19, 2001 under the bi-line of reporter Michelle Lang. In that news story, Ms. Lang reported on the contents of a Statement of Claim issued on behalf of Upshall against Durst on December 17, 2001 as well as the contents of the aforementioned Affidavit of Upshall. The news story related the fact that Upshall's Statement of Claim asserted an entitlement to a balance of monies owed to him by Durst, which monies had been paid by Saskatchewan Agriculture and Food and Agriculture and Agri-Food Canada to Durst for services rendered under contracts which Upshall claimed to have played a role in obtaining. Upshall had been a member of the Saskatchewan Legislature until his defeat in the general election of September 16, 1999 and had been a member of Executive Council at the time of his election defeat. The news story proceeded to speculate on whether or not Upshall and others had breached the provisions of *The Member's Conflict of Interest Act* ("the *Act*"), which prohibits former members of Executive Council from entering into contracts with elements of the Provincial Government within one year of the defeat of the former member.

In her letter of December 19, 2001, Ms. Bakken referred to specific provisions of the *Act* that relate to the prohibition referred to in the preceding paragraph. Ms. Bakken concluded her letter in the following words:

> "Therefore, any member of Executive Council or other government employee involved in awarding these contracts to Mr. Upshall would also be in violation of the *Act*. Since Mr. Upshall's Statement of Claim indicates that his work consisted of "Securing the contract and initiating contracts with relevant government officials," I am also asking you to

determine who these officials were and whether their actions constituted a violation of Section 8 of the *Act*. Specifically, I am asking whether former Agriculture Minister Dwain Lingenfelter and/or current Agriculture Minister Clay Serby were aware of these contracts with Mr. Upshall."

THE STATUTORY PROVISIONS

In her letter of December 19, 2001, Ms. Bakken made reference to two provisions of the *Act* which she felt had relevance to the facts that had come to her attention. She firstly referred to sub-section 34(1) of the *Act* which reads as follows:

> "34(1) No former member of the Executive Council shall, unless 12 months have expired after the date when he or she ceased to hold office:
>
> (a) accept a contract or benefit that is awarded, approved or granted by the Executive Council, a member of the Executive Council or an employee of a department, secretariat, or office of the Government of Saskatchewan or a Crown corporation, including a corporation in which the Government of Saskatchewan owns a majority of shares; or
>
> (b) make representations on his or her own behalf or on behalf of any of the former member's family with respect to a contract or benefit."

This sub-section describes an offence, the prosecution of which is within the purview of the officers of the Department of Justice. In the circumstances, there is no action required by me respecting the provisions of this section. It was in fact determined in January, 2002 by the Criminal Justice Service of Manitoba, to whom the issue had been referred, that there was no basis for prosecution because the six months' limitation period that applies to prosecutions under the *Act* had expired.

Also referenced by Ms. Bakken in her letter of December 19, 2001 was Section 8 of the *Act* which reads as follows:

> "8(1) The Executive Council, a member of the Executive Council or an employee of a department, secretariat or office of the Government of Saskatchewan or a Crown corporation, including a corporation in which the Government of Saskatchewan owns a majority of shares, shall not

> knowingly award a contract to or approve a contract with, or grant a benefit to, a former member of the Executive Council or to any of the former member's family until 12 months have expired after the date on which the former member ceased to hold office.
>
> (2) Subsection (1) does not apply to contracts of employment with respect to further duties in the service of the Crown.
>
> (3) Subsection (1) does not apply if the conditions on which the contract or benefit is awarded, approved or granted are the same for all persons similarly entitled."

Based on the factual matters that were brought to my attention by Ms. Bakken, I concluded that sufficient reason had been established for me to carry out an Inquiry respecting a breach of Section 8 by one or more persons.

Section 29 of the *Act* sets out three circumstances under which I may provide "an opinion respecting compliance of a member...with the provisions of"... the *Act*. This Section reads as follows:

> 29(1) A member who has reasonable and probable grounds to believe that another member is in contravention of this Act may request, by application in writing setting out the grounds for the belief and the nature of the contravention alleged, that the commissioner give an opinion respecting the compliance of the other member with the provisions of this Act.
>
> (2) A member who makes a request for an opinion pursuant to subsection (1) shall promptly provide the member who is the subject of the request with a copy of the application.
>
> (3) The Assembly may request, by resolution, that the commissioner give an opinion on any matter respecting the compliance of a member with the provisions of this Act.
>
> (4) The President of the Executive Council may request that the commissioner give an opinion on any matter respecting the compliance of a member of the Executive Council with the provisions of this Act.

(5) Where a matter has been referred to the commissioner under subsection (1) or (3), the Assembly or a committee of it shall not conduct an inquiry into the matter until it has received the opinion of the commissioner."

In her letter of December 19, 2001, Ms. Bakken did not refer to any specific provision of the *Act* in requesting action on my part. I am proceeding on the assumption that her request for action is based on the provisions of sub-section 29(1) of the *Act*; the factual aspects set forth in her letter and attachments thereto in my view support a request for an opinion, as contemplated by sub-section 29(1) of the *Act*. I note that Ms. Bakken sent a copy of her letter to me to Minister Serby, in compliance with sub-section 29(2) of the *Act*.

Upon receiving a request for an opinion pursuant to the provisions of Section 29, I am empowered to conduct an inquiry as detailed in the provisions of Section 30 of the *Act*.

"30(1) The commissioner may conduct an inquiry:

(a) on receiving a request under section 29; or

(b) where the commissioner considers it to be advisable respecting the compliance of a member with the provisions of this Act.

(2) The commissioner shall provide the member who is the subject of the inquiry with reasonable notice of an inquiry pursuant to subsection (1).

(3) For the purposes of an inquiry under this section, the commissioner has all the powers conferred on a commissioner pursuant to The Public Inquiries Act.

(4) Where the request for an opinion is made pursuant to subsection 29(1) or (3), the commissioner shall report his or her opinion to the Speaker and to the member who is the subject of the opinion.

(5) On receipt of an opinion pursuant to subsection (4), the Speaker shall lay the opinion before the Assembly as soon as is practicable if it is in session or, if it is not in session, at the next session.

(6) Where the request for an opinion is made under subsection 29(4), the commissioner shall report his or her opinion to the President of the Executive Council."

Having reviewed the materials initially provided to me, I concluded that I would conduct an inquiry pursuant to Section 30 of the *Act* for the purpose of providing an opinion in pursuance of Section 29. In order to clarify the scope of the inquiry and any opinions or recommendations flowing therefrom, I issued the following public statement on December 21, 2001:

"I have been asked by the member for Weyburn-Big Muddy to provide an opinion pursuant to the provisions of *The Member's Conflict of Interest Act* respecting several matters related to certain business activities of Mr. Eric Upshall. I have decided I will conduct an inquiry pursuant to Section 30 of the *Act*, which I hope to commence early in the New Year.

The *Act* mandates that the opinion I ultimately provide and any recommendations that accompany the opinion relate to the conduct of a "member" as that term is defined by the *Act*. I will inquire into all relevant factual matters, but any opinion I advance and recommendations I make will relate only to current members of the legislature as stipulated by the *Act*. Further, as required by the *Act*, I shall report to the Speaker of the Legislature and any member who is the subject of my opinion."

Clause 2(1)(g) of the *Act* defines 'member' in these terms:

"2(1) In this Act:

...

(g) "member" means:

(i) a member of the Assembly; or
(ii) a member of the Executive Council;"

It appears clear to me that the member referred to in the various pertinent provisions of the *Act*, means a current member of the Legislature or a current member of the Executive Council and no other person.

By letter dated December 24, 2001, I advised Minister Serby of my decision to conduct an Inquiry. He is the only person, in the circumstances, who required reasonable notice of the Inquiry pursuant to sub-section 30(2) of the *Act*.

INDIVIDUALS INTERVIEWED AND COPIES OF DOCUMENTS OBTAINED

In carrying out the Inquiry, I determined that it would be necessary to obtain and record the recollections of a number of individuals respecting the events in issue. I presumed that the recollections of the key role players would furnish me with the names of other individuals who would likely have relevant information to provide to me. This proved to be the case as the interviews with individuals proceeded.

Before commencing interviews with individuals, I discussed the process with Ms. Bakken. I invited her to provide me with the names of any particular individuals that she thought I should interview. She had no specific names to give to me.

Interviews commenced on January 8, 2002 and continued to March 6, 2002. A listing of the 10 persons interviewed in the order I conducted the interviews is attached as Appendix "B". In certain circumstances, follow-up interviews were carried out.

I did not conduct an interview with Durst. I was not able to determine his whereabouts but received information that he is likely resident in Los Angeles, California, at the present time. As recently as March 11, 2002, I was informed by Upshall's counsel that he had been unable to locate Durst to serve him with Court documents. Although it would have been desirable for me to interview Durst, I am of the view that the information given to me by those that directly dealt with Durst satisfactorily reveals the true state of affairs respecting relevant events.

All of those persons I have interviewed were co-operative and, in my view, frank and forthcoming in describing to me their recollections of material circumstances surrounding the matters that I considered relevant. On those occasions when I requested delivery to me of copies of documentation I wished to obtain, each of the interviewees unhesitatingly provided me with the desired copies. A listing of the copies of documents

obtained from interviewees and utilized by me in the preparation of this Report is set forth in Appendix "C" hereof. With one exception, subsequently referred to, copies of these documents are being filed with the Speaker, along with this opinion.

Sub-section 30(3) of the *Act* provides me with the powers to subpoena witnesses and documents and take evidence of individuals under oath.

> "30(3) For the purposes of an inquiry under this section, the commissioner has all the powers conferred on a commissioner pursuant to The Public Inquiries Act."

I initially determined to attempt to obtain the recollections of all individuals through informal interviews and reserve the option of using the powers granted to me under sub-section 30(3) only in the event that was required. There was no circumstance in the course of my Inquiry where I felt it was necessary to take the evidence of any individual under oath or to require the production of documents by subpoena. This was not a matter of such factual complexity as required an inquiry involving the employment of counsel or the taking of evidence under oath.

Not all of the copies of documents given to me by interviewees, as listed in Appendix "C", have been filed with the Speaker along with this Report. Two lengthy notebooks provided to me by Mr. David Boehm have been returned to him. Mr. Boehm provided to me, along with his notebooks, a summary of relevant extracts from the notebooks. I am satisfied that the summary accurately and fairly reflects the contents of the notebooks.

REVIEW OF RELEVANT INFORMATION PROVIDED BY THE 10 INTERVIEWEES

(i) The Honourable Clay Serby

Minister Serby is the Member for Yorkton and has occupied several Cabinet roles in the Government of Saskatchewan for a number of years. He was appointed Minister of Agriculture and Food on July 10, 2000, replacing Dwain Lingenfelter who had resigned as Minister of that department effective July 6, 2000. Gordon Nystuen ("Deputy Minister Nystuen") was appointed Deputy Minister of Agriculture and Food on September 1, 2000. Deputy Minister Nystuen replaced Terrance Scott ("Scott") as Deputy Minister who had left that role effective June 1, 2000.

The Department of Agriculture and Food is staffed by approximately 450 employees. It is presently organized into four major divisions namely:

1. Program and Services;
2. Central Support;
3. Agricultural Development and Policy; and
4. Financial Services.

Following his appointment, Minister Serby acquired knowledge that his department had entered into contractual relationships with Durst for the carrying out of certain survey work. He received a copy of the contract that led to the conducting of the survey and saw the results of the final survey product in March of 2001. It is Minister Serby's understanding that the results of the survey were utilized by the department in helping develop farm policy.

Minister Serby advised me that at no time did he have any information that Upshall had any involvement in the survey efforts carried out on behalf of the department by

Durst until he read of the events described in the Leader Post news story of December 19, 2001. Immediately following the news story, which described Upshall's assertions in documents filed in Court proceedings respecting his involvement in the survey contract, Minister Serby asked Deputy Minister Nystuen to provide him with a detailed report respecting the matter. Deputy Minister Nystuen caused inquiries to be made within the department and provided the Minister with a report. The details of this inquiry and the nature of the report provided to Minister Serby are referred to in the summary of the recollections of Deputy Minister Nystuen and Mr. Harold Cushon.

(ii) Eric Upshall

Upshall served as a Member of the Saskatchewan Legislature from 1986 until September of 1999, when he was defeated in a general election. He represented the constituency lastly named Watrous and his home town was the neighbouring community of Young, Saskatchewan. Upshall was appointed Minister of Agriculture and Food in November of 1995 and occupied that position until his electoral defeat in September of 1999. Upshall has farmed since 1974. In recent times, he has been engaged in specialty crops, such as the growing of saskatoons and apples. He has also raised buffalo.

In August of 2001 Upshall was employed as Project Development Consultant for the Livestock Development Branch of Saskatchewan Agriculture and Food.

Upshall became involved in business ventures with Durst in the late winter months and spring of 2000. He had known Durst casually prior to the winter of 2000 and became reacquainted with him at a social event in Saskatoon in January of 2000. In the days and weeks following Upshall and Durst spoke from time to time regarding potential business opportunities. Upshall knew that Durst had extensive experience in public relations and devising programs for and carrying out surveys. Having been defeated in the election, Upshall was unemployed and saw an association with Durst as an opportunity to learn something about

the consulting business and to earn some income. Upshall viewed himself as having a better than average knowledge of agricultural matters and felt that the combined talents of Durst and himself might be marketable with a department of the Provincial Government.

Upshall was of the view that he was restricted by some rules of conflict of interest from entering into any business arrangements with the Executive Council of the Government of Saskatchewan; he was not aware of any other limitations respecting former cabinet ministers contracting with or receiving a benefit from Government departments nor did he have any recollection of reading or being made aware of the specific provisions of the *Act* in that regard.

Upshall and Durst decided to work together in attempting to obtain a contract with Saskatchewan Agriculture and Food for the carrying out of some market or informational survey work. It is Upshall's recollection that it was agreed that the joint enterprise would be carried out in the name of Kevin Durst Enterprises, an unincorporated and unregistered trade name, but that they would later form a partnership, having the business name of DMZ Direct Marketing.com. Upshall would contribute his agricultural knowledge and Durst his public relations and survey knowledge to the joint venture and any profits would be shared equally between the two.

Sometime in early February, 2000, Upshall met with the then Deputy Minister of Agriculture and Food Scott. He advanced to Scott the suggestion that Scott receive and consider a survey proposal from Durst. Upshall acknowledged that Scott questioned him as to whether the proposal was solely Durst's and that Upshall assured him that was the case. He also acknowledged that Scott told him the Department would not contract with Upshall. Upshall subsequently rationalized that at the time of this discussion there was no contract with the Department and, hence, no sharing of profits arrangements with Durst had been triggered.

Durst wrote a proposal directed to Saskatchewan Agriculture and Food in mid-February, 2000. Upshall advised that he provided assistance in the writing of the proposal and gave Durst the names of the individuals whom he might contact in the department with respect to the proposal. All negotiations with the department officials were carried out by Durst and Upshall has a recollection of attending only one or possibly two meetings with department officials in connection with the carrying out of the contracts that were ultimately finalized.

Upshall has a recollection of one specific meeting where the perameters of the survey instrument were discussed. He recollected that this meeting took place in the Walter Scott Building, at the Department of Agriculture and Food. Present were David Boehm and Doug Fowler of Saskatchewan Agriculture and Food along with himself and Durst.

Upshall has no distinct recollection of discussing with any particular individual his involvement with Durst in business dealings with Saskatchewan Agriculture and Food. He feels he was not secretive about the arrangements and remembers discussing his arrangements with Durst and Saskatchewan Agriculture and Food on a casual basis in the spring of 2001 with Mr. Dan D'Autremont, Member of the Legislature for Cannington.

Upshall has no recollection of contacting any Minister of the Government or official of the Department of Agriculture and Food with respect to obtaining or finalizing the contract with that department, apart from his initial meeting with Scott. It is his recollection that these contacts were made solely by Durst, with Upshall simply indicating the individuals who might be contacted.

It is Upshall's recollection that Durst made all decisions regarding money matters respecting the contracts ultimately concluded. Upshall has a recollection of discussing with Durst the total time requirements for the carrying out of each contractual obligation but the dollar figures finally negotiated were the result of the views and efforts of Durst.

It is Upshall's understanding that Durst negotiated with representatives of Agriculture and Agri-Food Canada respecting the contribution by that Federal department towards the carrying out of the survey. Upshall played no role in these discussions or the finalizing of the arrangements that were ultimately made with Agriculture and Agri-Food Canada. It is his position that he had an agreement with Durst to share equally in all monies received respecting the carrying out of the survey, including the monies paid by Agriculture and Agri-Food Canada.

Upshall asserted that all of his arrangements with Durst were oral. He said that the oral agreement to formalize the partnership under the name of DMZ Direct Marketing.com was never pursued. He advised that all payments received by Durst in connection with the survey endeavours were shared equally with him, with the exception of the final two payments: one for $20,000.00 received from Saskatchewan Agriculture and Food and the other from Agriculture and Agri-Food Canada in the sum of $27,500.00.

Upshall commenced an action in the Court of Queen's Bench for Saskatchewan by Statement of Claim dated December 17, 2001, wherein he claims against Durst the sum of $23,750.00, being the one-half share of the final payments respecting the contracts.

(iii) Gordon Nystuen

Gordon Nystuen was appointed Deputy Minister of Agriculture and Food September 1, 2000. Prior to his appointment, he had been in the employ of a private consulting firm.

In the months following his appointment, Deputy Minister Nystuen was aware of the Best Practices Survey and the report that had been provided by Durst following the completion of the report. He was not aware of Upshall's involvement in the carrying out of the survey or the preparation of the report until approximately the month of March, 2001. At that

time, Upshall came to see Deputy Minister Nystuen and told him of his claim against Durst for money owing. He asked if there was any remaining money to be paid to Durst and requested that that balance be paid to Upshall.

At the time of this meeting, Upshall asked Deputy Minister Nystuen to have the Department provide him with all information as to what had been paid under the contract and what remained to be paid.

Deputy Minister Nystuen referred the matter to Mr. Jack Zep ("Zep"), Director of Administration for the Department. He requested Zep to put together information as to what was owing and to whom under the terms of the contract.

In due course, Zep advised Deputy Minister Nystuen that the contract was with Kevin Durst and Associates and that there was no reason to pay any monies to Upshall under the contract. He also advised Deputy Minister Nystuen that a copy of the contract itself could be made available to Upshall pursuant to the provisions of *The Freedom of Information and Protection of Privacy Act* but the details of payments made and yet to be made to Durst and Associates were not releasable to the public under the provisions of that *Act*. Deputy Minister Nystuen conveyed this information to Upshall. He heard nothing more about the matter until he read the account of the claim of Upshall against Durst as reported in the Regina Leader Post on December 19, 2001.

On the date of the publication of the news story, Minister Serby asked Deputy Minister Nystuen to provide a detailed report as to what had occurred within the Department in relation to the matters detailed in the news story. Deputy Minister Nystuen requested that a review of factual matters be carried out by Mr. Harold Cushon ("Cushon') of the Department. Cushion had been appointed Assistant Deputy Minister in August of 2001 and, previous to that date, had occupied the position of Director of Policy and Programs.

Cushon provided an oral report to Deputy Minister Nystuen and to Minister Serby, after carrying out inquiries of personnel in the Department respecting the events in question. Written notes of the oral report provided to Minister Serby and Deputy Minister Nystuen were prepared by Cushon and are included in the documents listed in Appendix "C".

Sometime during the months of November or December, 2000, Upshall requested and received a meeting with Deputy Minister Nystuen. At the meeting, Upshall advanced to Deputy Minister Nystuen a proposal to study the use of containers in Saskatchewan with regard to the transportation of pulse crops. Large containers, which are transported by rail cars, apparently come from various points in the Orient to Western Canada packed with a variety of products and almost always return empty to their point of origin. The concept of the proposal was to find a means whereby the containers would be utilized in Saskatchewan before leaving the Province to the financial advantage of crop producers and distributors.

Deputy Minister Nystuen advised Upshall he would check with staff members regarding the proposal. Deputy Minister Nystuen informed me that he receives a number of petitions for the carrying out of a variety of surveys and, in his view, each must be assessed as to the needs of the department and the merits of the proposal.

Upon checking with department officials, Deputy Minister Nystuen learned that the department already had sufficient detailed information respecting the use of containers and Upshall was so advised.

During the spring months of 2001, the Department of Agriculture and Food created a Livestock Development Branch. One of its objectives was to focus on the technical aspects of raising cattle, elk and buffalo. Labour resources were needed to study such things as feed efficiency and related business development in the community in relation to livestock development. Upshall was offered an in-scope position in the newly organized department and

is currently employed on a 12 month term contract. Following the completion of that term, his job will be posted and subject to competition.

iv) **David Boehm**

Mr. David Boehm ("Boehm") is presently the acting director of Financial Programs Branch for Saskatchewan Agriculture and Food. He has held that position since late October 2001. He was previously the director of the Statistics Branch for the Department, which position he occupied from late 1995 to October, 2001.

Boehm is the Department official who was most directly involved in the business dealings with Durst and in finalizing the formal arrangements with him.

Boehm kept a detailed chronological record of all communications with Durst in the formulating and carrying out of the contracts which are a major consideration of this report. He maintained his notes in a two-volume notebook which Boehm has kindly made available to me. Additionally, Boehm prepared a summary of pertinent events he recorded in the notebooks and has made this summary available to me. My review of the notebooks and the summary of them indicates to me that the summary is an accurate reflection of the detail contained in the notebooks. The summary is included in the documents listed in Appendix "C".

Boehm's introduction to the matter in question occurred in mid-February 2000 when he received a telephone call from Mr. Paul Johnson, Assistant to the then Deputy Minister of Agriculture and Food Scott. Mr. Johnson indicated that the Deputy Minister had received a proposal for the conducting of a survey which they wished to discuss with Boehm. A meeting of Mr. Johnson, Scott and Boehm took place on February 25, 2000. At the meeting a proposal prepared by Durst and Associates regarding the "organic industry" in Saskatchewan was discussed.

At the meeting, Boehm expressed the view the proposed survey would not be successful. It was Boehm's view that the "organic industry" would not be inclined to cooperate sufficiently for the successful carrying out of the survey. (I am advised that the "organic industry" is the farms and farmers that do not use chemicals, fertilizers or pesticides.)

Scott asked Boehm if there were any other projects which the Statistics Branch wished to have conducted. Boehm, in fact, had a list of approximately six projects that could be the subject of survey efforts. At the top of Boehm's list of possible surveys was the subject of "Adaptation Strategies/Best Practices". This subject topped Boehm's list of possible surveys and he felt it was desirable to carry out a survey to attempt to determine what activities successful farmers engage in as opposed to the practices that are followed by farmers who are less successful.

On February 28 and 29, 2001, Boehm and Scott discussed the merits of employing Kevin Durst and Associates for the purpose of carrying out the Best Practices Survey. They decided to attempt to finalize contractual and financial arrangements with Durst for the purpose of carrying out this survey.

Durst indicated willingness to pursue the venture and Boehm developed an initial contract dated March 6, 2000 to employ Durst, for the purpose of developing the actual survey instrument. The contract provided that Kevin Durst and Associates, retained by the Department of Agriculture and Food, were to design a survey instrument "for a collection of information related to the actions taken by Saskatchewan farmers to improve the profitability of their farming operations." The design of the survey instrument was to be completed on or before March 31, 2000. The Department agreed to pay Durst $9,000.00 for the preparation of the survey instrument.

This agreement between the Department and Durst is listed as a document in Appendix "C".

Boehm had not met Durst before the meeting of March 6, 2000, when the initial agreement was executed. He was not aware of any involvement on the part of Upshall in the undertaking until a discussion with Durst on April 3, 2000, following the delivery by Durst of the completed survey instrument to the Department. At that time Durst proposed a meeting and indicated that Upshall may attend the meeting. This was the first indication to Boehm that Upshall had any involvement in the survey to be undertaken.

Although Boehm does not have a distinct memory now of there being a sensitivity to the involvement of Upshall in this contract, he now feels there probably was such an attitude on his part because of the inclusion in his note of April 3, 2000 of the proposal to include Upshall at the meeting. Boehm did not know of the provisions of Section 8 of the *Act* at the time, but did know there was a sensitivity surrounding contracting with a recently departed former minister. Also, he had doubts as to Upshall's expertise with survey work, but, in his view, Durst obviously was experienced in this area.

Through April and May, 2000 discussions were carried out in the Department and with Durst respecting specific survey methodology and how to move into phase two of the project including the contractual arrangements for the carrying out of the actual survey.

In late May, 2000 discussions took place between Durst and Boehm with regard to the involvement of Agriculture and Agri-Food Canada. It was Boehm's view that it was desirable to have the Federal Department work with the province in connection with this survey and to identify some means whereby the Federal Department would share in the cost. Durst and Boehm agreed that something in excess of $50,000.00 would be required to carry out the actual survey, and that Saskatchewan Agriculture and Food wished to limit its expenditure to $50,000.00. Negotiations with Mr. David Culver of Agriculture and Agri-Food Canada

resulted in that Department agreeing to advance up to $27,500.00 towards the cost of the survey by a direct payment to Durst. This provision was incorporated in the agreement finalized June 29, 2000. This payment (paragraph 4.3) was characterized as a $27,500.00 fee for sale by Durst of the survey data and reports to Agriculture and Agri-Food Canada.

The formal agreement for the carrying out of the actual survey was prepared by Boehm and executed by Durst and Boehm on behalf of Saskatchewan Agriculture and Food on June 29, 2000. This contract for conducting the survey is included in the documents listed in Appendix "C".

Boehm has a written note dated June 20, 2000 that Durst mentioned to him in conversation Durst's desire that Upshall look at the draft questionnaire that was at that time being considered. He has no recollection of asking Durst precisely what Upshall's involvement was in the survey endeavor.

Following the execution of the agreement of June 29, 2000, Durst proceeded to conduct certain pretest interviews. These interviews led to discussions regarding the length of the questionnaire. A meeting took place on August 10, 2000 at the office of Boehm. Upshall attended the meeting with Durst. Mr. Doug Faller of Boehm's Department attended as well. The purpose of the meeting was to refine the questions on the survey and to thereby shorten the survey. Although Upshall attended the meeting it is Boehm's recollection that he had very little to contribute to the discussion. Boehm had qualms about the presence of Upshall at the meeting but these qualms were not expressed in any official manner. It is Boehm's recollection that this was the only meeting that involved Upshall and Boehm never did learn the precise involvement of Upshall in the ongoing survey endeavors.

The survey efforts were carried out through the late fall and winter months of 2000. It was agreed that 100 farmers would be interviewed for the purpose of conducting and completing the survey. Time lines became a problem and the date for the completion of the

contract was extended to the end of January, 2001. The final report was in fact not produced until March 29, 2001, and the invoices for the final report were paid.

Boehm was satisfied with the report and the presentations made formally by Durst respecting the report. An executive summary of the report was prepared and presented at a meeting of Department officials on June 21, 2001. This executive summary of the report is listed as a document in Appendix "C".

v) Dan D'Autremont

Mr. Dan D'Autremont, the Member of the Legislature for the constituency of Cannington, has a memory of discussing various matters with Upshall over the last two or three years, but he has no present recollection of discussions with Upshall concerning his business relationships with Durst and the Department of Agriculture and Food.

vi) Harold Cushon

Harold Cushon is presently Assistant Deputy Minister of Saskatchewan Agriculture and Food and has occupied that position since August of 2001. From 1993 to the date of his appointment as Assistant Deputy Minister, Cushon was director of policy and programs in this department.

Following the publication of the December 19, 2001 Regina Leader Post news story regarding the contractual involvement of Upshall with Saskatchewan Agriculture and Food, Deputy Minister Nystuen asked Cushon to investigate the events and provide a report to Minister Serby. Following interviews with the former Deputy Minister Scott and Boehm, Cushon provided an oral report to Minister Serby and Deputy Minister Nystuen. This report was provided within a week of the news story. A transcript of the notes of Cushon that formed the basis of his oral report is listed as a document in Appendix "C".

The information contained in Cushon's notes is a brief replication of the information that has been provided to me by Scott and Boehm. Cushon's three conclusions following his limited inquiry are reproduced here:

- "SAF made due diligence efforts to ensure its activities with Kevin Durst and Associates were appropriate.

- Mr. Scott – Deputy Minister at the time – explicitly asked Mr. Upshall if he was part of Kevin Durst and Associates and was told no.

- David Boehm – Director of Statistics, who took the lead with respect to the actual project – dealt with Kevin Durst only to develop the project."

Cushon played no role in the negotiating or awarding of the contracts to Durst in the spring months of 2000. He was aware of the conduct of the survey but had no personal involvement. He knows that it is normal for Saskatchewan Agriculture and Food to contract out survey work on certain occasions.

In June, 2001, Cushon attended the meeting where Durst presented the results of his survey efforts to a senior management group. Prior to this meeting Cushon had never met Durst.

Durst was alone at the time of the presentation of the results. Cushon read the report and listened to the presentation of Durst. He was of the view that the survey and the report provided useful information on the subject of "best practices" and he felt that the presentation by Durst to the senior management group was done in a competent fashion.

vii) Terrance Scott

Mr. Terrance Scott who served as Deputy Minister of Saskatchewan Agriculture and Food until September 1, 2000, physically left the Department on June 1, that year, and the final three months of his tenure were viewed as vacation.

Sometime during early February 2000 Scott received a request to meet with Upshall at the office of Scott. Scott, who had been Deputy Minister to Upshall for a period of two years prior to Upshall's defeat in the general election of 1999, agreed to meet with Upshall. After discussing matters generally related to the farm crisis, Upshall raised the question of a proposal for survey being submitted by Durst. Scott has a recollection of questioning Upshall as to whether or not he, Upshall, had any personal interest in the proposal for survey that Durst wished to submit to the Department and it is Scott's recollection that he was assured by Upshall that any proposal would be that of Durst himself and that Upshall had no expectation that the Department would contract with him. As a result Scott advised Upshall that Durst could submit his proposal to the Department.

It is Scott's present recollection that he had no wish to see the Department enter into a contractual relationship with Upshall having regard to the fact that he had been the Minister of the Department for two years up to December of 1999. Having been assured by Upshall that he had no business interest in the proposal Durst wished to submit to the Department Scott did not turn his mind again to conflict of interest matters. At that time, Scott was not aware of the specific provisions of the *Act* relating to the 12 month prohibition against former Members of Executive Council contracting with arms of Government.

Some days later a proposal from Kevin Durst and Associates arrived at the office of Scott. The proposal related to a potential survey of the organic industry in the Province of Saskatchewan. A review of the proposal and a discussion of it with members of

the Department, including Boehm, resulted in the decision that the proposed survey could not be successfully done. However, Boehm indicated that he had alternative options for surveys, the most pressing of which in his mind was a survey respecting the practices being pursed by successful farmers in Saskatchewan. It was agreed by Scott and Boehm that Boehm would canvass with Durst the feasibility of Durst designing a survey in the desired area.

In the months before to Scott left his position of Deputy Minister on June 1, 2000, he touched base from time to time with Boehm on the development of the survey instrument and the contract for carrying out the actual survey. It is Scott's view that the Department had an obligation to look at the proposals of a person like Durst in an unbiased way and to utilize such person's expertise if it was established that the Department could benefit from the expertise demonstrated. Scott had no concerns at the time that Upshall had an arrangement to do certain tasks for Durst in the carrying out of the survey, provided Upshall had no direct interest in the contract that was being negotiated.

Scott had no reason to again turn his mind to matters related to the Best Practice Survey until December 20, 2001. At that time he received a telephone call from Upshall who wanted to discuss the matters raised in the Leader-Post news story of December 19, 2001. During the course of that conversation, Scott advised Upshall that Saskatchewan Agriculture and Food had contracted with Durst and had no knowledge of any contractual relationship between Upshall and Durst.

Scott had a further telephone call from Upshall on January 9, 2002. At that time Upshall advised Scott that he in fact had a working business relationship with Durst and that Durst owed him money as a result. Scott reminded Upshall that they had discussed this matter in February of 2000 when Upshall had assured him the contract that Durst was seeking was solely for Durst.

Following Upshall's initial visit to Scott in February of 2000 Scott felt it would be prudent to raise the subject with the then Minister of Agriculture, Dwain Lingenfelter. He arranged for and met with Mr. Lingenfelter, in Lingenfelter's office, at some time after deciding to enter into the initial contract with Durst. It is Scott's recollection that he advised Mr. Lingenfelter of his visit from Upshall and his discussion with him respecting the contractual matters that were unfolding. It is Scott's recollection that Mr. Lingenfelter told him that the Department could contract with Durst but not with Upshall. At approximately the same time, Scott had a discussion with Judy Samuelson, Chief of Staff at the Premier's Office. It is Scott's recollection of that conversation that Judy Samuelson indicated to him it was appropriate to contract with Durst but not with Upshall.

viii) David Culver

David Culver ("Culver") is employed as the chief of the Farm Data and Analysis Unit of Agriculture and Agri-Food Canada. He confirmed to me the recollections of Boehm respecting the involvement of Canada Agriculture and Agri-Foods in the years 2000 and 2001.

Culver has informed me that he was approached by Boehm during the spring months of 2000 and was invited to become involved in the "Successful Farmer Survey" and to contribute in some financial way to the conducting of this Survey.

Culver advised me that it is difficult for the Canadian Department of Agriculture and Agri-Foods to enter into a contract with a Provincial Department of Agriculture for the conducting of a survey such as was being contemplated in the spring of 2000. He agreed however on behalf of his department to purchase the results of the completed Survey from Kevin Durst & Associates for a price not exceeding $27,500.00.

In the summer of 2001, he arranged for Durst to travel to Ottawa at the expense of the Federal Department of Agriculture and Agri-Food for the purpose of presenting to officials of the Federal Department a seminar on the results of the survey and the survey report. Culver has informed me that he and his department were satisfied with the quality of both the Survey and the report and that it met the requirements of his department.

Kevin Durst & Associates sent an invoice to Agriculture and Agri-Foods for $27,500.00, which was in due course paid.

ix) **Judy Samuelson**

Judy Samuelson ("Samuelson") is presently Cabinet Secretary and Clerk of the Executive Council. In the spring of 2000, she was Chief of Staff in the Premier's office. Although Samuelson has a note of receiving a call from Scott in May of 2000, the note contains no specific reference to the subject matter of the call. Samuelson presently has no memory of Scott speaking with her about a potential contract with Durst or any involvement of Upshall.

Samuelson does have a recollection of receiving a telephone call from Upshall following the general election of September, 1999, and discussing with him the availability of work within Government agencies. Samuelson had specific knowledge of the provisions in the *Act* respecting former Members of Executive Council and recalls speaking with Upshall about these statutory provisions.

Samuelson was not aware of the Durst contractual relationship with Saskatchewan Agriculture and Food until she read the story in the December 19, 2001, Regina Leader-Post.

x) **Dwain Lingenfelter**

Dwain Lingenfelter ("Lingenfelter") is presently Vice-President of Government Relations for Nexen Inc. He has held that position since retiring as Saskatchewan Minister of Agriculture and Agri-Food on July 6, 2000.

Lingenfelter, at the time of interview, had a vague recollection of discussions respecting a contract between his Department and Durst for a survey. He has no recollection of any particulars of the contract or the precise purpose of the survey nor does Lingenfelter have any present recollection of the name of Upshall being raised with him in connection with the Durst contract. He believes that his first knowledge of the events that are the subject of this inquiry was as a result of his having read the article appearing in the December 19, 2001, Regina Leader-Post.

ASSESSMENT OF INFORMATION GATHERED

The information provided to me by the several individuals I have interviewed establishes a fairly uncomplicated series of events resulting in Durst providing his services to organize and conduct a specific public survey on behalf of Saskatchewan Agriculture and Food as well as Agriculture and Agri-Food Canada in consideration for payment of agreed amounts of money. There are no significant variations in the recollections of the major role players interviewed as to how the subject of a possible survey evolved from an initial discussion into formal contracts, the carrying out of a survey, and the reporting of the results of the survey.

There are differing recollections on the part of the individuals interviewed respecting discussions related to the specific involvement of Upshall in the survey endeavour. Memories of events often vary from one person to another and different versions of the same event can be expected. The differences in recollections in my inquiry have been restricted to who said what to whom regarding the extent of the involvement of Upshall in the survey endeavour. Those I interviewed obviously viewed this subject as a sensitive area. However, having regard to the opinions arrived at and the recommendations to be made in this Report, I conclude the inconsistencies in this area are not relevant to my conclusions.

It is quite clear that the subject of the survey endeavour was introduced by Upshall at a meeting he had with then Deputy Minister Scott in early February, 2000. Upshall, who had lost his seat in the Saskatchewan Legislature in the general election of September, 1999, had formed a business relationship with Durst prior to this meeting. Durst had an expertise in developing and carrying out survey assignments. Upshall had a farming background and the two joined together in an informal business relationship. At the time, Upshall was unemployed. He felt he could learn from Durst about the survey field and contribute his general knowledge of agriculture to their joint effort.

The information I have reviewed satisfies me that Upshall and Durst orally agreed to join together in seeking out some type of survey assignment with Saskatchewan Agriculture and Food. Durst had the expertise to formulate proposals, negotiate terms and direct the survey effort. Upshall had a farm background and knew the contact people in the Department. I am satisfied that Upshall and Durst agreed to each contribute in his own particular way to negotiating, finalizing contracts and carrying out survey efforts on behalf of the Department, sharing equally the remuneration paid for the effort. Durst was to be the leader of the venture and serve as the contact man. Upshall was to make the initial contacts, provide information as to the major role players in the Department and assist in the actual survey.

Scott was prepared to receive from Durst a proposal for the conducting of a survey as suggested to him by Upshall. He felt the Department had an obligation to consider serious proposals submitted by business persons in the Province and to assess the proposals in the light of the needs of the Department. In this particular case, he was concerned with the fact that the subject was raised by Upshall, his former Minister. Although he had no knowledge at the time of any specific statutory or other guidelines prohibiting contractual relations with former Ministers, he wanted Upshall's assurance that Upshall had no business interest in any proposal Durst might submit. He received this assurance from Upshall.

Upshall indicates that he was under the mistaken belief that he could, as a recently defeated Minister of Saskatchewan Agriculture and Food, engage in business dealings with Government Departments other than the Executive Council. He asserts that he had no knowledge of the prohibitions in the *Act* respecting not only Executive Council but individual members of Executive Council, employees of departments, secretariats, offices or Crown Corporations of the Government of Saskatchewan contracting with or granting a benefit to a former member of Executive Council or the former member's family until the expiration of twelve months from the date the former member ceased to hold office.

Scott had a similar lack of knowledge of any specific prohibition but wanted to avoid any direct business dealings with his former minister Upshall. Only after he felt satisfied that Upshall had no direct involvement in the proposal Durst wished to submit did he agree to receive and consider the proposal. Upshall did, in fact, have a business interest in the survey proposal of Durst and gave Scott incorrect information in this regard.

A proposal for the conducting of a survey related to the organic industry in Saskatchewan was subsequently submitted by Durst to Scott. The survey proposal is dated February 15, 2000 and the cover page describes the proposal as being submitted by "Kevin Durst & Associates". I have determined that this is an unregistered trade name of Durst and I will continue to refer to him in this Report as Durst.

Department officials considered the proposal and determined that the Department did not wish to become involved in a survey of the provincial organic industry. It was the view of Boehm and others that such a survey would not be successful.

However Boehm, in his capacity as Director of the Department's Statistics Branch, had developed an outline for a number of potential survey efforts. Six of the optional survey possibilities were outlined in Boehm's February 28, 2000 briefing note. Listed as number 1 option is "Adaptation Strategies - Best Practices Survey". The keys to the project are described by Boehm in Briefing Notes as follows:

> **"Option 1: Adaptation Strategies – Best Practices Survey:**
>
> - collection information on what farmers have done to remain profitable in the post-Crow era
> - what has worked and what has not
> - focus will be on:
>   - new enterprises that have been added (beef, sp. Crops, seed cleaning plant, custom spraying operations, etc.)
>   - changes in agronomic practices (zero till/direct seeking, organic, transgenics)

- innovative marketing options (investment in local hog barn for barley delivery opportunities, hedging, etc.)
- "collective" action (use of buying clubs, machinery co-ops, etc.)
- off-farm employment and non-farm businesses
- off-farm investment (stocks, bonds, etc)"

Discussions between Boehm and Durst resulted in an agreement that Durst would formulate an outline for the carrying out of the Best Practices Survey. A contract was prepared by Boehm and executed on March 6, 2000 by Durst and Boehm, who signed on behalf of the Department of Agriculture and Food. The Agreement is described as "Best Practices Survey Development". Durst agreed to "design a survey instrument for the collection of the information related to the actions taken by Saskatchewan farmers to improve the profitability of their farming operations" (para. 2.1 of Agreement). Durst was to be paid $4,500.00 upon satisfactory completion of his obligations under the Agreement, $4,500.00 having been paid on signing the Agreement. The work under the contract was duly completed and the money paid.

During the months of May and June, 2000, Boehm and Durst developed the actual survey instrument and the methodology that would be employed in the carrying out of the actual survey. The price to be paid to Durst by the Department was agreed at $50,000.00, $30,000.00 at signing and the balance upon completion and acceptance of the final report. Since the total fair remuneration for the carrying out of the work was deemed by both Boehm and Durst to exceed $50,000.00, it was decided to attempt to involve Agriculture and Agri-Food Canada in the venture. That department, represented by Culver, agreed to participate and contribute $27,500.00 to the survey undertaking. Because of difficulties that apparently exist when the provincial and federal departments attempt to contract directly, it was agreed that the federal share of the survey cost would be characterized in the Agreement as the purchase price to be paid by Agriculture and Agri-Food Canada for the survey results.

Boehm's first knowledge of the possible involvement of Upshall came on April 3, 2000, approximately one month into the survey venture with Durst. Boehm made a note in

his notebook on that day that Durst wished to have Upshall attend a meeting. Of the several meetings that Boehm had with Durst during the course of the survey project, Upshall attended only one, on August 10, 2000. Although Boehm had concerns about the apparent involvement of Upshall in the survey project, he did not question his presence at the meeting nor did he ever learn of the precise involvement of Upshall. Throughout the course of the survey report, Boehm dealt only with Durst.

The survey was conducted and completed over a number of months in the latter part of 2000 and early 2001. A 40 page report dated March 28, 2001 with appendices of equal length was prepared by Durst and presented to Saskatchewan Agriculture and Food and to Agriculture and Agri-Food Canada.

In June of 2001, Durst made oral presentations to Government Departments in Regina and Ottawa. A copy of the Executive Summary of the "Best Practices" survey presented to both Government Departments is included in the documents listed in Appendix "C".

Boehm and Culver were both satisfied with the survey that had been conducted by Durst and with the written and oral reports of the survey. Each felt the terms of the contract had been met by Durst and final payments were made to Durst.

Up to this point in time, Durst had equally divided with Upshall the payments to him from Saskatchewan Agriculture and Food, being the nine thousand dollars paid for the development of the survey instrument and the initial payment of thirty thousand dollars under the main contract. Durst did not share the final payment of twenty thousand dollars from Saskatchewan Agriculture and Food and the payment of twenty-seven thousand five hundred dollars from the Federal Department with Upshall. Not having had the opportunity of speaking with Durst, I do not know what his position is in this regard.

The news story of December 19, 2001, was prompted by the lawsuit initiated by Upshall against Durst for the claimed share of remuneration for the survey services. This story, in turn, prompted Minister Serby to have inquiries made as to the events that transpired in relation to this office. A report was provided to Minister Serby and Deputy Minister Nystuen by Assistant Deputy Minister Cushon. Cushon spoke only with Scott and Boehm in gathering information for his oral report.

OPINION AS TO WHETHER A MEMBER BREACHED ANY PROVISIONS OF *The Member's Conflict of Interest Act*?

In her letter of December 19, 2001, Ms. Bakken requested me to investigate former Executive Council member Eric Upshall for possible violations of *The Member's Conflict of Interest Act*. She also asked me to determine whether officials of the Government of Saskatchewan, including former Agriculture Minister Lingenfelter and current Agriculture Minister Serby were involved in any breaches of the *Act*.

Ms. Bakken may, in appropriate circumstances, request an opinion from me respecting the compliance of a "member" with the provisions of the *Act* but the request cannot include persons other than a "member". In providing my opinion, I am similarly limited by the provisions of the *Act* to expressing an opinion respecting compliance with the provisions of the *Act* by those who are members as defined by the *Act*. As previously stated, I am of the view that "member" means a current member duly elected to the Legislature of Saskatchewan, including a current member of Executive Council.

The only person mentioned by Ms. Bakken in her request for an opinion who falls into the category described in the preceding paragraph is Minister Serby. There is no information that has come to my attention to support any suggestion that Minister Serby breached any provisions of the *Act*. Minister Serby had no involvement in the business dealings of Upshall, Durst and the Department of Agriculture and Food. These events preceded the appointment of Minister Serby as Minister of the Department. He first learned of the involvement of Upshall in the Best Practices Survey upon reading the news story of December 19, 2001. He immediately took reasonable steps to learn of the basic facts surrounding the issue.

The information provided to me, does not, of course, indicate that there was a breach of the provisions of the *Act* by any member respecting this issue.

RECOMMENDATIONS RESPECTING THE *ACT*.

This Inquiry and the reasons for it have caused me to have an introspective look at *The Member's Conflict of Interest Act* in general, and the provisions related to former members of Executive Council and the carrying out of inquiries in particular.

The *Act* is not yet ten years old, having been assented to June 22, 1993. It is understandable that experiences with the *Act* since that date will have revealed some deficiencies. I have reason to believe that amendments to various provisions of the *Act* will, in due course, be presented to the Legislative Assembly for its consideration. My focus in this Report is on the provisions of the *Act* respecting inquiries by the Commissioner and what have come to be described as the "cooling off" provisions.

Members' Conflict of Interest, and ethics of Parliamentarians' legislation, is of relatively recent vintage. Each province and territory of Canada now has some legislation that attempts to establish rules to avoid conflict of interest on the part of elected officials and to monitor their legislative and administrative activities, with an eye to their personal monetary and property affairs.

The major provisions of all Canadian Acts relate to disclosure of the property and monetary affairs of each elected member and the involvement of the Commissioner in any anticipated problem the member's private interest might bring to that member's public duties and obligations. The time devoted to these matters is far greater than the time devoted to any other matters that might arise under the *Act*. This is certainly true in Saskatchewan and I am informed it is the case in other jurisdictions. These major provisions of the *Act* have worked well and may require an amendment related only to the filing of Private Disclosure Statements with the Commissioner.

Virtually all Canadian jurisdictions have, in addition to the basic disclosure of assets provisions, some prohibition against a former member of Executive Council obtaining a contract or benefit from any arm of the Government he or she has served, which prohibition exists from one to two years after the member has left Government. These provisions give effect to the view that former members of Executive Council should not be allowed, for a specific period of time, to advance their personal interests with persons they have come to know as members of Executive Council, unless the matter relates to a benefit available to the ordinary citizen. The reasoning for the prohibition was articulated as follows in the "First Report on Conflict of Interest Legislation" (December 18, 1998) New Brunswick, Legislative Assembly:

> "When conflict legislation makes provision for a 'cooling-off period', citizens can be more confident that former Ministers and public officials do not have, or do not appear to have, an unfair advantage over others in influencing government. Legislating a pre-determined "cooling-off" period for elected and public officials...would bolster the confidence of electors, and ensure that individuals do not reap unjust personal gains through the improper use of information or contacts obtained in the course of previous employment."

I am informed that the subject matter of this Inquiry has not been previously raised by way of inquiry in any other Canadian jurisdiction. This, apparently, is the first time in Canada there has been an allegation of the possible breach of the "cooling-off" provision.

It is convenient at this point to repeat the provisions of Section 8 of the Saskatchewan *Act*:

> "8(1) The Executive Council, a member of the Executive Council or an employee of a department, secretariat or office of the Government of Saskatchewan or a Crown corporation, including a corporation in which the Government of Saskatchewan owns a majority of shares, shall not knowingly award a contract to or approve a contract with, or grant a benefit to, a former member of the Executive Council or to any of the former member's family until 12 months have expired after the date on

which the former member ceased to hold office.

(2) Subsection (1) does not apply to contracts of employment with respect to further duties in the service of the Crown.

(3) Subsection (1) does not apply if the conditions on which the contract or benefit is awarded, approved or granted are the same for all persons similarly entitled."

Essential to a breach of Section 8 is the act of "knowingly" awarding a contract to or granting benefit to a former member of Executive Council within the 12 month prohibited period. No one, who falls into the category of persons prohibited in Section 8 from such acts, committed any breach of Section 8, in my view. The contracts in question were clearly with Durst and not Upshall, and Deputy Minister Scott, who dealt with Upshall, received confirmation from Upshall that Upshall was receiving no benefit. Although Upshall did, in fact, receive a benefit, it was indirect and no one with Government "knowingly" granted that benefit to Upshall.

Upshall clearly indicated from the beginning that he was advancing the interests of Durst, at the very least. He did not make clear to those with whom he dealt that an interest benefit would flow to him if contracts were entered into with Durst. The present situation could have been avoided if the legislation prohibited a former member of Executive Council acting on behalf of someone in negotiations with provincial government officials in relation to a matter in which the former minister previously had official involvement (and all concerned observed the prohibition). The circumstance of a former minister lobbying with officials of his or her former department for a contract on behalf of a third party, especially if the former minister receives benefits for a successful lobby, is as unpalatable as the Minister attempting to contract or obtain a benefit directly. Some jurisdictions have legislatively covered this situation.

Section 8 and Section 34

I recommend that Section 8 and Section 34 be replaced by provisions akin to the following:

"X(1) The Executive Council, its members, and employees of a department shall not knowingly,

(a) award or approve a contract with, or grant a benefit to, a former member of the Executive Council until 12 months have passed after the date he or she ceased to hold office;

(b) award or approve a contract with, or grant a benefit to, a former member of the Executive Council who has, during the 12 months after the date he or she eased to hold office, made representations to the Government of Saskatchewan in respect of the contract or benefit;

(c) award or approve a contract with, or grant a benefit to, a person on whose behalf a former member of the Executive Council has, during the 12 months after the date he or she ceased to hold office, made representations to the Government of Saskatchewan in respect of the contract or benefit.

X(2) Clauses 1(a) and (b) do not apply to contracts or benefits in respect of further duties in the service of the Crown.

X(3) Subsection (1) does not apply if the conditions on which the contract or benefit is awarded, approved, or granted are the same for all persons similarly entitled.

Y(1) A former member of the Executive Council shall not knowingly, during the 12 months after the date he or she ceased to hold office,

(a) accept a contract or benefit that is awarded, approved, or granted by the Executive Council, a member of the Executive Council or an employee of a department;

(b) make representations to the Government of Saskatchewan on his or her own behalf or on another person's behalf with respect to such contract or benefit;

(c) accept a contract or benefit from any person who received a contract or benefit from a department of which the former member was the minister.

Y(2) Subsection (1) does not apply to contracts or benefits in respect of further duties in the service of the Crown.

Y(3) Subsection (1) does not apply if the conditions on which the contract or benefit is awarded, approved, or granted are the same for all persons similarly entitled.

Y(4) A former member of the Executive Council shall not make representations to the Government of Saskatchewan in relation to a transaction or negotiation to which the Government is a party and in which he or she was previously involved as a member of the Executive Council, if the representation could result in the conferring of a benefit not of general application.

Y(5) Subject to subsections 28(5) and 29(2), a person who contravenes subsection (1) or (4) is guilty of an office and liable, on conviction, to a fine of not more than $50,000.00"

I recommend that some program be put into place to officially inform Deputy Ministers and senior officials of the "cooling-off" provisions of the *Act*. My inquiries satisfy me that officials in Executive Council are fully apprised of the provisions of the *Act* in this regard. However, other officials have limited knowledge of the existence of the statutory provisions.

Each year I meet with each member of the legislature as required by the *Act*. In subsequent meetings with Members of Executive Council, I will review with them the current legislative provisions respecting post ministerial restrictions.

The Penalty Provision

It has been determined that no prosecution can be commenced pursuant to subsection 34(1) of the *Act* because of the six month limitation period that would apply to such

prosecution. This limitation is impractical and should be extended to a period of two years from the date of completion of the contract or the end of the benefit. The law must allow for sufficient time to discover possible breaches of the *Act*, to investigate and to lay charges. There is presently insufficient time to do these things and to penalize the person who has breached the provision.

The penalty provision is presently directed to former members of the Executive Council. In my view, it should not be expanded to include other persons who may play a role in the breach of the "cooling off" provisions of the *Act*. Members of the Legislature should continue to be subject to the discipline of the Legislative Assembly for such breaches. Government officials and employees should continue to be subject to such employer/employee discipline as is determined to be appropriate in the circumstances. Only those who are not subject to discipline of the Legislative Assembly and the employer/employee relationship, including former members of Executive Council, should be subject to prosecution under the provisions of Section 34 of the *Act* after the amendments suggested herein.

I suggest this because the *Act* is presently directed to avoiding conflict situations on the part of members of the Legislature, members' families and members' associates as defined by the *Act*. The Commissioner is required to provide an opinion respecting the conduct only of members and to make recommendations respecting the contravention of any provisions of the *Act* by a member. The legislative scheme revealed by the *Act* is to have the Commissioner deal only with members by way of opinion and recommendation, even though others, such as former members of Executive Council and government employees and officials are mentioned in the *Act*. Breaches of the *Act* can be dealt with in the employer/employee realm in the case of government officials and in the penalty provisions in case of non-members and non-governmental officials, such as former members of Executive Council.

Some jurisdictions in Canada have statutory conflict of interest provisions that embrace both elected legislators and senior government officials. If the latter is the desired

statutory scheme for Saskatchewan, an entirely new *Act* would be needed and not merely random amendments.

Section 30

Sub-sections 30(4) and (5) of the *Act* provide:

> "30(1) The commissioner may conduct an inquiry:
>
> ...
>
> (4) Where the request for an opinion is made pursuant to subsection 29(1) or (3), the commissioner shall report his or her opinion to the Speaker and to the member who is the subject of the opinion.
>
> (5) On receipt of an opinion pursuant to subsection (4), the Speaker shall lay the opinion before the Assembly as soon as is practicable if it is in session or, if it is not in session, at the next session."

Hence, where the request for an opinion is made pursuant to sub-section 29(1) (by a member, which is the case here) or sub-section 29(3) (by the Assembly) it is my obligation to report to the Speaker and the member who is the subject of the opinion.

The Speaker is required to "lay the opinion before the Assembly" as soon as practicable or at the next session, if the House is not sitting. Obviously, there could be a lengthy delay in the opinion being made public if the House has recently adjourned or been prorogued. I therefore recommend an amendment to sub-section 30(5) to permit the Speaker to make public the opinion if the Assembly is not in session at the time of the delivery of the opinion.

As observed earlier in this Report, there are three circumstances set forth in Section 29 of the *Act* where the Commissioner may undertake the giving of an opinion. Clause 30(1)(b) provides an additional circumstance where the Commissioner may conduct an inquiry and provide an opinion and that is "where the commissioner considers it to be advisable".

However, the *Act* does not specifically set out that the results of such inquiry be delivered to the Speaker. The *Act* should be amended to so provide.

Dated at the City of Regina, in the Province of Saskatchewan, this 15th day of March, 2002.

G. L. GERRAND, Q.C.
Conflict of Interest Commissioner
Province of Saskatchewan

GLG/oc
Enclosures

RECEIVED
DEC 24 2001

Saskatchewan Legislative Assembly

Member
Bakken

December 19, 2001

Mr. Gerald Gerrand
Conflict of Interest Commissioner
500-2220 12th Avenue
Regina, Saskatchewan
S4P 0M8

Dear Mr. Gerrand:

I am writing to request an investigation into former Executive Council member Eric Upshall for possible violations of ***The Members' Conflict of Interest Act.***

On December 17, 2001, Mr. Upshall filed a Statement of Claim in Regina against Kevin Durst. I have included a copy of this Statement of Claim for your information.

In his Statement of Claim, Mr. Upshall indicates that he entered into two contracts with Saskatchewan Agriculture and Food – one on March 6, 2000 and the other on June 29, 2000. With regard to the second contract, Paragraph 11 of Mr. Upshall's Statement of Claim states: "that most of the early work under the second contract was performed by him, and that this work consisted primarily of securing the contract (and) initiating contacts with relevant government officials."

Section 34(1) of ***The Members' Conflict of Interest Act*** states:

> *No former member of the Executive Council shall, unless 12 months have expired after the date when he or she ceased to hold office:*
>
> ***(a) accept a contract or benefit that is awarded, approved or granted by the Executive Council or an employee of a department, secretariat, or office of the Government of Saskatchewan or a Crown corporation, including a corporation in which the Government of Saskatchewan owns a majority of shares; or***
> ***(b) make representations on his or her own behalf or on behalf of any of the former member's family with respect to a benefit or contract.***

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Mr. Upshall was defeated as an MLA on September 16, 1999 and was replaced as Minister of Agriculture on September 30, 1999. Therefore, both of the contracts with Saskatchewan Agriculture and Food mentioned in Mr. Upshall's Statement of Claim were entered into prior to the completion of the 12 month "cooling off period" prescribed in the *Act*.

Section 8(1) of the *Act* states:

> ***The Executive Council, a member of the Executive Council or an employee of a department, secretariat or office of the Government of Saskatchewan or a Crown corporation, including a corporation in which the Government of Saskatchewan owns a majority of shares, shall not knowingly award a contract to or approve a contract with or grant a benefit to, a former member of Executive Council or to any of the former member's family until 12 months have expired after the date on which the former member ceased to hold office.***

Therefore, any member of Executive Council or other government employee involved in awarding these contracts to Mr. Upshall would also be in violation of the *Act*. Since Mr. Upshall's Statement of Claim indicates that his work consisted of "securing the contract and initiating contacts with relevant government officials," I am also asking you to determine who these officials were and whether their actions constituted a violation of Section 8 of the *Act*. Specifically, I am asking whether former Agriculture Minister Dwain Lingenfelter and/or current Agriculture Minister Clay Serby were aware of these contracts with Mr. Upshall.

Thank you for your attention to this important matter.

Sincerely,

Brenda Bakken.

Brenda Bakken, MLA
Weyburn-Big Muddy

cc Honourable Clay Serby
Deputy Premier/Minister of Agriculture

CLAIM

1. The Plaintiff, ERIC UPSHALL, is a resident of Regina, in the Province of Saskatchewan.

2. The Defendant, KEVIN DURST, was, at all material times to this action, a resident of Regina, in the Province of Saskatchewan.

3. In March 2000, the Plaintiff and Defendant agreed to form a partnership under the business name of DMZ Direct Marketing.Com for the purpose of carrying on business in the Province of Saskatchewan. The partnership was never registered, but the business name was to be used in the future as a vehicle for payment to the Plaintiff and Defendant. The Plaintiff states that DMZ Direct Marketing.Com was the name previously used in a business venture by the Defendant.

4. The Plaintiff states that until the partnership was registered he and the Defendant agreed to use the existing bank account of Kevin Durst and Associates, a business name registered by the Defendant, and that, to the best of the Plaintiff's knowledge, the Defendant retained sole authority over banking transactions in respect of that account.

5. The Plaintiff states that he and the Defendant orally agreed that the earnings of their partnership paid to and through Kevin Durst and Associates would be divided between them on an equal basis.

6. The Plaintiff states that he and the Defendant, under the business name Kevin Durst and Associates, entered into a contract dated March 6, 2000 with Saskatchewan Agriculture and Food, to design and test a survey instrument. The Plaintiff and the Defendant completed the work under the contract and were paid $9,000.00 pursuant to the terms of the contract and, in accordance with their agreement, the Plaintiff and Defendant each received $4,500.00

7. On June 29, 2000, the Plaintiff and Defendant secured a second contract in the name of Kevin Durst and Associates for survey and analysis work required by Saskatchewan Agriculture and Food. Kevin Durst and Associates was to be paid $50,000.00, in two installments, for completing the work under the second contract. The first installment was in the amount of $30,000.00 and the second installment was to be in the amount of $20,000.00.

8. Under the terms of the second contract, Saskatchewan Agriculture and Food made its first payment to Kevin Durst and Associates on July 18, 2000, in the amount of $30,000.00. Monies received from the first payment under the second contract were divided equally between the Plaintiff and Defendant. In April, 2001 $20,000.00 was paid to Kevin Durst and Associates as a second and final payment on the second contract. The Plaintiff has received no monies from the $20,000.00 payment.

9. The Plaintiff states that a third contract was entered into by the Plaintiff and Defendant, under the name of Kevin Durst and Associates, with the Federal Department of Agriculture and Agri-Food Canada whereby Agriculture and Agri-Food Canada was to purchase the results of the survey and analysis work prepared pursuant to the second contract for the sum of $27,500.00. The Plaintiff states that it was agreed that all payments would be made to Kevin Durst and Associates by Agriculture and Agri-Food Canada.

10. The Plaintiff states that Agriculture and Agri-Food Canada made its payment to Kevin Durst and Associates pursuant to the terms of the third contract but that the Plaintiff has never received his equal share of the contract proceeds from Kevin Durst and Associates.

11. The Plaintiff states that most of the early work under the second contract was performed by him, and that this work consisted primarily of securing the contract,

initiating contacts with relevant government officials, determining scope of work, identifying and contacting appropriate survey respondents, distributing and ensuring return of correctly-completed questionnaires. The Plaintiff states that the Defendant's primary work was in the collation and analysis of the questionnaire results and the preparation of a final report.

12. The Plaintiff states that during the course of the Defendant's work, the Defendant was unable to perform some of the required analysis and other tasks, and that some of this work was out-sourced to another firm for completion. The details of the out-sourcing arrangements and costs thereof are not known to the Plaintiff.

13. Upon completion of the final report in 2000, Kevin Durst and Associates received final payments under the second and third contracts in the following amounts:

From Saskatchewan Agriculture and Food - $20,000.00
From Agriculture and Agri-Food Canada - $27,500.00

14. The Plaintiff states that officials of Saskatchewan Agriculture and Food contacted the Defendant following completion of the report and asked that a presentation be made to them of the report's findings. The Defendant complied with the request and at no time informed the Plaintiff of the request or otherwise solicited his participation in the presentation.

15. Despite repeated requests and a demand for same, the Defendant has refused and continues to refuse to pay half of the final payments to the Plaintiff, being the amount of $23,750.00. The Plaintiff states that the outstanding $23,750.00 is a debt due and owing from the Defendant to the Plaintiff.

16. The Plaintiff therefore claims the following relief from the Defendant:

a. Payment of or judgment in the amount of $23,750.00, representing one-half of the proceeds from the final payments under the second and third contracts, as a debt due and owing;

b. Interest on the sum of $23,750.00, from May 1, 2001, to the date of payment or judgment calculated in accordance with the provisions of *The Pre-judgment Interest Act*, S.S. 1984-85-86, c. P-22.2.;

c. Costs of the within action.

DATED at the City of Regina, in the Province of Saskatchewan, this 17th day of December, 2001.

OLIVE WALLER ZINKHAN & WALLER

PER:
Solicitors for the Plaintiff, Eric Upshall

This document was delivered by:

OLIVE WALLER ZINKHAN & WALLER
Barristers and Solicitors
2255 Thirteenth Avenue
Regina, Saskatchewan
S4P OV6

Address for Service: Same as Above

Lawyer in Charge of File: Perry D. Erhardt

Telephone: (306) 359-1888

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Q.B.G. No. 383 of 2001

IN THE COURT OF QUEEN'S BENCH
JUDICIAL CENTRE OF REGINA

QUEEN'S BENCH
JUDICIAL CENTRE of REGINA
DEC 17 2001
FILED

BETWEEN:

ERIC UPSHALL

PLAINTIFF

AND:

KEVIN DURST

DEFENDANT

AND:

CANADA TRUST

PROPOSED GARNISHEE

AFFIDAVIT of ERIC UPSHALL

I, ERIC UPSHALL, of the City of Regina, in the Province of Saskatchewan, MAKE OATH AND SAY:

1. THAT I am the Plaintiff herein and as such have a personal knowledge of the facts and matters deposed to herein except where stated to be based upon information and belief, and where so stated, I verily believe the same to be true.

2. THAT the Defendant and I secured three (3) separate contracts for work which we undertook to complete together. The first two contracts were with Saskatchewan Agriculture and Food and the third was with Agriculture and Agri-Food Canada.

3. With respect to each of the contracts, the Defendant and I were to share the contract proceeds on an equal basis and, although the Defendant lived up to that obligation with respect to payments under the first contract in March 2000, and the first of two payment installments under the second contract, he failed to live up to the obligation in respect of the second installment on the second contract of June, 2000 as well as the third contract we entered into with Agriculture and Agri-Food Canada.

4. THAT I retained the services of a solicitor and previously demanded payment of my part of the proceeds from the Defendant but the Defendant did not respond to the demand. The total amount which I am claiming against the Defendant is the sum of $23,750.00, exclusive of interest as at May 1, 2001.

5. THAT based on all of the foregoing and the particulars set out in the Statement of Claim filed herein, the Defendant is justly and truly indebted to me for the full amount of the claim.

6. THAT to the best of my information and belief, Canada Trust, the above-named proposed Garnishee, is indebted to Kevin Durst, the above-named Defendant, in an amount which I am unable to specify.

7. THAT I make this Affidavit for the purpose of obtaining a Pre-Judgment Garnishee Summons, pursuant to the provisions of s. 3 of *The Attachment of Debts Act*, R.S.S. 1978, c. A-32.

SWORN before me at the City of Regina, in the Province of Saskatchewan, this 17th day of December, 2001.

A COMMISSIONER FOR OATHS in and for the Province of Saskatchewan.
My Commission Expires:

ERIC UPSHALL

This document was delivered by:

OLIVE WALLER ZINKHAN & WALLER
Barristers and Solicitors
202, 2255 Thirteenth Avenue
Regina, Saskatchewan
S4P OV6

Address for Service: Same as Above

Lawyer in Charge of File: Perry D. Erhardt

Telephone: (306) 359-1888

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Appendix "B"

Listing of the 10 persons interviewed in the order of their interview being conducted

(i) The Honourable Clay Serby

(ii) Eric Upshall

(iii) Gordon Nystuen

(iv) David Boehm

(v) Dan D'Autremont

(vi) Harold Cushon

(vii) Terrance Scott

(viii) David Culver

(ix) Judy Samuelson

(x) Dwain Lingenfelter

Appendix "C"

Listing of copies of documents filed with the Speaker

(i) Written notes of oral report provided to Minister Serby and Deputy Minister Nystuen as prepared by Harold Cushon

(ii) Agreement dated March 6, 2000 between Her Majesty the Queen in Right of the Province of Saskatchewan, as represented by the Minister responsible for the Department of Agriculture and Food and Kevin Durst & Associates

(iii) Agreement dated June 29, 2000 between Saskatchewan Agriculture and Food and Kevin Durst and Associates

(iv) Chronology of Events prepared by David Boehm

(v) Executive Summary of report dated June 12, 2001 prepared and formally presented at meeting of Department officials June 21, 2001